

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALICIA CABRERA)	
Claimant)	
VS.)	
)	
CASCO, INC.)	Docket No. 198,074
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Both claimant and respondent requested review of the Award dated September 20, 1996, entered by Special Administrative Law Judge Michael T. Harris. The Appeals Board heard oral argument on March 12, 1997, in Wichita, Kansas.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for the claimant. Douglas D. Johnson of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Special Administrative Law Judge found a November 30, 1994, date of accident and awarded claimant permanent partial disability benefits for a 30 percent work disability. Both parties requested review. The issues now before the Appeals Board are:

- (1) Whether claimant sustained personal injury by accident which arose out of and in the course of her employment with the respondent.
- (2) The nature and extent of claimant's disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Special Administrative Law Judge should be modified.

- (1) The Appeals Board finds that claimant sustained personal injury by accident arising out of and in the course of her employment with the respondent. The evidence supports the conclusion that it is more probably true than not that claimant sustained a series of mini-traumas while performing her job duties as a machine operator which culminated in an accidental injury on claimant's last day of work for the respondent. For this period of accident, the Appeals Board selects May 18, 1995, as the date of accident because it is shown as claimant's last day of work in an exhibit introduced at claimant's deposition.

The conclusion that claimant's work activities caused injury is supported by board-certified physical medicine and rehabilitation physician, Lawrence R. Blaty, M.D. He testified claimant had a preexisting degenerative condition in the cervical spine which was aggravated, accelerated, and made symptomatic by her work.

- (2) Claimant first began working for respondent in November 1991. In November 1994, claimant began noticing symptoms in her left arm. From that time forward, claimant's symptoms progressed until she was having problems with both upper extremities and her neck. In June 1995, claimant underwent anterior discectomy with fusion at C5-6 by Dr. Abay. After recuperating from that surgery, the doctor released claimant to return to work in August 1995. At that time claimant contacted respondent but was told it could not accommodate her permanent work restrictions. Claimant then filed for and received unemployment benefits. In April 1996, respondent offered to return claimant to work with accommodations at the same rate of pay she was earning on the date of accident. Although claimant was unemployed, she declined the offer because she was hoping to enter a job training program associated with a local aircraft company. Between claimant's medical release in August 1995 and the accommodated job offer in April 1996, respondent changed human resources managers. That personnel change appears to account for respondent's delay in offering an accommodated position.

Because hers is an "unscheduled" injury, K.S.A. 44-510e governs the computation of permanent partial disability benefits. That statute provides, in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee

performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

During the period from August 1995 through April 1996 when claimant was released to return to work but respondent neither accommodated nor offered to accommodate claimant by providing a job within her permanent work restrictions, claimant is entitled to permanent partial disability benefits based upon an average of her tasks loss and wage loss. Based upon the testimony of Dr. Blaty, who was the only physician to provide an opinion of tasks loss, the Appeals Board finds that claimant lost the ability to perform 30 percent of the job tasks which she performed in the 15-year period before her work-related accident. Because claimant was unemployed between August 1995 and April 1996, the Appeals Board finds the difference in claimant's pre- and post-injury wages was 100 percent for that period. Averaging the 30 percent tasks loss with the 100 percent wage loss yields a work disability of 65 percent.

Because the evidentiary record does not reveal the actual date claimant was released to return to work in August 1995, the Appeals Board selects August 25, 1995, which was the date claimant visited respondent's plant and was told respondent could not accommodate her restrictions. The Appeals Board finds respondent's offer of accommodated employment was effective as of April 8, 1996, based upon the testimony of respondent's human resources manager Kay Riegel. Accordingly, claimant is entitled to a 65 percent work disability award for the period of August 25, 1995, through April 7, 1996, a period of 32.43 weeks.

For the period commencing April 8, 1996, claimant is entitled to permanent partial general disability benefits based upon the stipulated 11 percent whole body functional impairment rating. Under the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), once respondent makes a good-faith offer of accommodated employment which pays a comparable wage, claimant must attempt to perform that work unless there is reasonable justification to do otherwise.

The Appeals Board finds that respondent's offer of accommodated employment in April 1996 was made in good faith, and also finds that claimant did not have reasonable justification not to attempt it. At that time claimant had not entered the job training program and it was mere speculation that she would be accepted. Therefore, for the period commencing April 8, 1996, the Appeals Board will impute the wages which claimant would have earned in the accommodated position. Because the imputed wage is greater than 90 percent of claimant's average weekly wage on the date of accident, claimant's entitlement

to permanent partial disability benefits commencing April 8, 1996, are limited to those based upon the 11 percent whole body functional impairment rating.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated September 20, 1996, entered by Special Administrative Law Judge Michael T. Harris should be, and hereby is, modified, as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Alicia Cabrera, and against the respondent, Casco, Inc., and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred May 18, 1995, and based upon an average weekly wage of \$282.90 for 20.75 weeks of temporary total disability compensation at the rate of \$188.61 per week, or \$3,913.66. For the period from August 25, 1995, through April 7, 1996, claimant is entitled to 32.43 weeks of permanent partial disability compensation at the rate of \$188.61 per week, or \$6,116.62, for a 65% work disability. For the period commencing April 8, 1996, claimant is entitled to 12.59 weeks of permanent partial general disability benefits at the rate of \$188.61 per week, or \$2,374.60, for an 11% whole body functional impairment rating, making a total award of \$12,404.88, all of which is due and payable in one lump sum, less any amounts previously paid.

The Appeals Board hereby adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Douglas D. Johnson, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Michael T. Harris, Special Administrative Law Judge
Philip S. Harness, Director